Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LEO A. DAMMER,

Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff alleging a discriminatory discharge under the Age Discrimination in Employment Act (ADEA) must point to evidence of a replacement to satisfy the fourth prong of the McDonnell-Douglas model or may inferences of discrimination be drawn from past age animus prior to the termination which can be tied to the discriminatory discharge to satisfy the requirements for a *prima facie* case.

2. Whether a plaintiff alleging a discriminatory discharge under the ADEA during a downsizing has been "constructively replaced" as a matter of law if his duties have been distributed to younger less qualified employees and, if so, whether such "constructive replacement" would satisfy the fourth prong of the McDonnell-Douglas *prima facie* case when replacement is the issue.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Statement of Jurisdiction 1

Statutes Involved 1

Statement of the Case 2

Reasons for Granting the Writ 7

I. Whether a plaintiff alleging a discriminatory discharge under the Age Discrimination in Employment Act (ADEA) must point to evidence of a replacement to satisfy the fourth prong of the McDonnell-Douglas model or may inferences of discrimination be drawn from past age animus prior to the termination which can be tied to the discriminatory discharge to satisfy the requirements for a *prima facie* case. 8

II. Whether a plaintiff alleging a discriminatory discharge under the ADEA during a downsizing has been "constructively replaced" as a matter of law if his duties have been distributed to younger less qualified employees and, if so, whether such

Contents

Page

"constructive replacement" would satisfy the replacement element in the fourth prong of the McDonnell-Douglas *prima facie* case. 11

Conclusion 12

TABLE OF CITATIONS

Cases Cited:

Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978) ... 10

Graefenhain v. Pabst Brewing Co., 827 F.2d 13 (7th Cir. 1987) 9

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 9

Mathewson v. National Automatic Tool Company, Inc., 807 F.2d 87 (7th Cir. 1986) 10

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 10

Montana v. First Federal S&L of Rochester, 869 F.2d 100 (2nd Cir. 1989) 10, 11

Thornbrough v. Columbus and Greenville R. Co., 760 F.2d 633 (5th Cir. 1985) 11

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 9

Contents

Page

Statutes Cited:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 5

29 U.S.C. § 621, *et seq.* 1

29 U.S.C. § 623(a)(1) 2

29 U.S.C. § 626, *et seq.* 5

APPENDIX

Appendix A — Sur Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated March 11, 1996 ..... 1a

Appendix B — Memorandum Opinion of the United States Court of Appeals for the Third Circuit Filed February 1, 1996 ..... 3a

Appendix C — Judgment of the United States Court of Appeals for the Third Circuit Dated February 1, 1996 ..... 11a

Appendix D — Order Implementing Mandate of the United States Court of Appeals for the Third Circuit Entered April 15, 1996 ..... 13a

Contents

Page

Appendix E — Opinion and Order of the United States District Court for the District of New Jersey Dated April 6, 1995 ..... 15a

Appendix F — EEOC Determination Letter Dated May 8, 1992 ..... 29a

Petitioner, Leo Dammer, respectfully prays that a Writ Of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported Circuit Court opinion dated February 1, 1996 is reproduced in the Appendix at App. 3a-10a and the unreported District Court opinion dated April 6, 1995 is reproduced at App. 15a-27a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on February 1, 1996. The court declined a Petition for Rehearing in Banc March 11, 1996. App. 1a-2a. The Order Implementing Mandate was entered April 15, 1996. App. 13a-14a. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, provides in part:

Section 621(b):

> [T]o promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment . . .

Section 623(a)(1):

> [I]t shall be unlawful for an employer to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age.

STATEMENT OF THE CASE

On April 3, 1972, petitioner became employed by respondent Mercedes-Benz of North America, Inc. ("Mercedes") in the import parts department. On September 4, 1991 after 19 and 1/2 years of service, the petitioner at age 56 was terminated from his employment during a reduction-in-force. Petitioner's position of Parts Import Supervisor was eliminated and his duties were assigned to others in the department. Petitioner was a well qualified employee and received merit raises throughout his career. The only reason given by Mercedes for petitioner's termination was the reduction-in-force (RIF) brought on by a downturn in new car sales. The Import Parts Department provided imported parts for all years of automobiles. Ernst Ruppert (Ruppert), the General Manager who was also in charge of petitioner's department made the decision to terminate petitioner.

On August 1, 1990, about a year prior to the downsizing, Mercedes offered a Voluntary Retirement Program to older workers who qualified only because of their age of 55 or over as an incentive to retire effective January 1, 1991. There was no mention or even a rumor of any possible RIF. Mercedes allowed employees three months until October 31, 1990 to consider whether to accept this incentive to retire. Several weeks before the October 31st deadline, petitioner was approached more than

once by his superior Erich Lenz (Lenz) to learn of petitioner's intentions about retiring. When petitioner inquired as to why he was being asked before the October 31st deadline, Lenz replied that Manager Ruppert was "after me" to find out.

Between August 1990 and late October 1990, contemporaneously with the offer of early retirement to petitioner, Ruppert, the decisionmaker who terminated petitioner, was in the process of making arrangements to hire Kay-Wohl Ahlden (Ahlden), a 28-year old male from Germany. Ahlden worked in the shipment of spare parts in Germany. As indicated, the negotiations to hire Ahlden were going on at the time that Ruppert was pressuring another employee to find out petitioner's intention about retiring. Mercedes did not provide any paper trail relating to Ahlden's pre-employment discussions and meetings.

When petitioner announced to Manager Ruppert that he decided not to accept early retirement, Ruppert (seated at his desk) did not even look up at petitioner. Ruppert merely stated "[t]hat's your decision . . . that's your decision." Immediately after petitioner refused the early retirement incentive, Manager Ruppert began to ignore petitioner and was "treating me [petitioner] like I wasn't even there." Other times Ruppert belittled petitioner and subjected him to unfounded criticism.

Mercedes-Benz of North America officially hired Ahlden on April 1, 1991. Ahlden was the 28-year old male (half petitioner's age) who, as indicated above, had been recruited at the same time when early retirement was offered to petitioner. Thereafter, Manager Ruppert included Ahlden but began to exclude petitioner from important meetings, thus depriving petitioner of crucial information relating to the performance of his duties . By July 1991, about two months before petitioner's termination, Ruppert was dealing almost exclusively with Ahlden in matters concerning petitioner's department and staff.

After Ahlden was hired and continuously thereafter, Ahlden would appear in petitioner's Import Parts Department and without consulting petitioner would give orders to petitioner's staff. Ruppert, without even telling petitioner, had also assigned to Ahlden petitioner's very important duty of visiting the different locations around the country where parts were imported. The main core of petitioner's duties had now been taken over by Ahlden. Petitioner complained to management about what was happening to his job. Petitioner related to management how Ahlden undermined petitioner's authority in front of his staff and how Ahlden had taken over petitioner's important duties. Petitioner felt that all this was done to "ease me out" of employment.

Documents prove Ruppert finalized plans in writing in July 25, 1991 to terminate petitioner.[1] On September 4, 1991, Mercedes-Benz terminated petitioner.

Besides the 28-year old Ahlden who was given the main core of petitioner's duties, just prior to petitioner's termination, at least one younger employee was hired in the Import Parts Department. After the downsizing, younger employees who were less qualified than petitioner were retained in the department. These younger employees were given the remains of petitioner's duties, the main core having already been assigned to Ahlden. Petitioner was given no option whatsoever to remain at Mercedes despite the fact his duties remained.

On November 21, 1991, petitioner filed an age disparate treatment charge under the ADEA with the Equal Employment Opportunity Commission (EEOC). Mercedes provided

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1. The District Court's finding that "the company . . . did not decide to eliminate plaintiff's position until one week prior to the implementation of the RIF" is in error. (App. 17a).

misleading information concerning Ahlden's employment status to the EEOC. In a computer print-out of respondent's employees provided to the EEOC, Ahlden was listed as a permanent employee of Mercedes-Benz of North America hired in September 1985,[2] over fiv years before his true hiring date of April 1,1991. In its determination, the EEOC did not address petitioner's concerns regarding Ahlden who took over petitioner's main duties. App. 29a-31a.

On July 18, 1992, after receiving the "right to sue" letter dated May 8, 1992 from the EEOC, petitioner filed a complaint as *pro se* claiming age discrimination under the ADEA against Mercedes-Benz in the United States District Court. Thereafter, petitioner retained counsel and the complaint was amended to include retaliation and state claims. The District Court had subject matter jurisdiction pursuant to 29 U.S.C. § 626, *et seq.*, 28 U.S.C. § 1331 and pendent jurisdiction.

In District Court, Mercedes modified Ahlden's employment status by classifying him as a 3-year contract, temporary employee. However, Ahlden's personnel records list Ahlden as a permanent employee and a new hire as of April 1, 1991. In fact, Ahlden was promoted and was still employed in 1995 when the Circuit Court appeal was filed, 4 years later. Mercedes created the Logistics Analyst position for Ahlden in 1991 when Ahlden was hired.

The District Court first ruled that it "does not believe that

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2. Ahlden had worked for Mercedes-Benz in Germany for five years since 1985 but the EEOC requested information about the employees of Mercedes-Benz of North America, Inc. and date of hire. The EEOC may have been left with the impression that Ahlden had been working in New Jersey since 1985 and, thus, did not consider Ahlden's role in petitioner's termination. Later in court documents, respondent listed April 1, 1991 as Ahlden's hiring date.

plaintiff has established a *prima facie* case" because (1) it "was not clear whether he [petitioner] was replaced with someone not in the protected class" and (2) "plaintiff has not sufficiently demonstrated that Mr. Ahlden was hired to replace him" specifically as Parts Import Supervisor. The district judge did find that Ahlden had assumed some of petitioner's former duties prior to the downsizing and that after the downsizing other employees as well assumed petitioner's remaining duties. (App. 23a). The District Court focused solely on job replacement as the a requirement to satisfy the fourth prong of the McDonnell-Douglas *prima facie* case.

The District Court continued with its analysis and ruled that petitioner did not prove intent to discriminate even if he had established a *prima facie* case. During oral argument held on March 27, 1995, the District Court judge opined that Hicks regrettably " blurs the distinction between proof of pretext and an . . . indirect proof of discrimination versus proof by direct evidence." Although petitioner's case was based solely on circumstantial evidence, the District Court focused on the stray remark introduced by Mercedes of "age before beauty." Petitioner did not introduce any direct evidence to support his case, only circumstantial. This stray remark was elicited during petitioner's deposition and perpetuated throughout the proceedings only by Mercedes. (App. 23a-24a). On April 6, 1995, the District Court granted summary judgment to Mercedes-Benz on the federal and state claims.

On appeal, the Third Circuit panel affirmed. First, the panel found that petitioner did not establish a *prima facie* case of age discrimination because petitioner had not demonstrated any new employee was hired to replace him. The Circuit Court did find that " a younger man assumed some of Dammer's [petitioner's] former duties, but he did not take over the job of Parts Import Supervisor." The Circuit Court found that "other employees in

the department assumed some of Dammer's [petitioner's] former responsibilities [because] the Parts Import Supervisor position was eliminated and consolidated." (App. 6a).

The Circuit Court held that even if petitioner had established a *prima facie* case of age discrimination, he nevertheless did not sustain his burden to overcome respondent's reason of a RIF for the termination. As did the District Court, the Circuit Court also focused on the stray remark "age before beauty" provided by the Mercedes as if this were petitioner's proffer of direct evidence of discrimination when, in fact, petitioner's case was presented as purely circumstantial. The petition for rehearing in banc was denied on March 11, 1996.

REASON FOR GRANTING THE WRIT

This writ of certiorari should be granted because there is a definite conflict among the Circuits concerning the evidence that is needed to establish a *prima facie* case under the ADEA especially in reduction-in-force cases. The guidance of this Court on this issue is crucial to insure that older qualified employees who have suffered discrimination "because of their age" will be properly served by our justice system. Only then can we even hope to eradicate age discrimination in the workplace.

I.

WHETHER A PLAINTIFF ALLEGING A DISCRIMINATORY DISCHARGE UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) MUST POINT TO EVIDENCE OF A REPLACEMENT TO SATISFY THE FOURTH PRONG OF THE McDONNELL-DOUGLAS MODEL OR MAY INFERENCES OF DISCRIMINATION BE DRAWN FROM PAST AGE ANIMUS PRIOR TO THE TERMINATION WHICH CAN BE TIED TO THE DISCRIMINATORY DISCHARGE TO SATISFY THE REQUIREMENTS FOR A *PRIMA FACIE* CASE.

The Third Circuit is in conflict with other Circuits with respect to what is necessary to satisfy the requirements for a *prima facie* case in ADEA cases. Using the mechanical application of the McDonnell-Douglas model, the Third Circuit held that petitioner did not meet the requirements of the fourth element of the a *prima facie* case because he "has not demonstrated any new employee was hired to replace him." The Circuit Court in passing without analysis also concluded that petitioner did not show that others not in the protected class were treated more favorably although, in fact, these employees took over petitioner's duties. (App. 6a).

In its strict mechanical application of the McDonnell-Douglas model, the Third Circuit discounted the hostile environment to which petitioner was subjected beginning immediately after petitioner refused the early retirement package; the fact this decisionmaker was making plans to hire a 28 year-old at the same time the petitioner was being offered the early retirement incentive; the fact that petitioner was approached more than once weeks before the deadline concerning his retirement; the fact that the younger new

employee took over the main duties of petitioner prior to the termination; the fact that there was not a total elimination of his job and, *inter alia*, the inconsistent explanations by Mercedes involving the employment status of this new young employee who took over petitioner's main duties. (App. 4a-5a). Each action standing alone may not be troublesome but clearly the cumulative effect could be viewed as sufficient evidence from which an inference of age discrimination could be drawn to satisfy the requirements for at least a *prima facie* case.

In *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987), the Seventh Circuit citing *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. at 711, 716, stressed

> When a plaintiff uses the indirect method of proof, no one piece of evidence need support a finding of age discrimination. "There will seldom be 'eye witness' testimony as to the employer's mental processes." As a result, plaintiffs have great difficulty in gathering information and often can present only circumstantial evidence of discriminatory motives. Therefore, to require, as did the district court, below that each piece of circumstantial evidence "standing alone" be sufficient to support a finding of age discrimination is to render meaningless the indirect method of proof and invite the pretexts that can render the ADEA a nullity.

In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977), this Court held that a *prima facie* case requires "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." When or where this evidence surfaced

should be irrelevant in establishing a *prima facie* case of age discrimination.

This Court has clearly stated that the McDonnell-Douglas *prima facie* case model is flexible and is "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." The model must not be used in a "rigid, mechanized, or ritualistic" way. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 575-77 (1978).

The Seventh Circuit in *Mathewson v. National Automatic Tool Company, Inc.*, 807 F.2d 87, 91 (7th Cir. 1986) noted that "it is well settled that evidence of earlier discriminatory conduct by an employer . . . is nevertheless entirely appropriate evidence to help prove a timely claim based on subsequent discrimination.

The Second Circuit in *Montana v. First Federal S& L of Rochester*, 869 F.2d 100,103-4 (2nd Cir. 1989) rejected First Federal's contention that in a reduction-in-force case plaintiff must show that she was replaced by a newly hired employee as the Third Count contends. The Second Circuit reinforced the proposition that the McDonnell-Douglas model is not inflexible and "is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas v. Green*, 411 U.S. 792, 802 n.13 (1973).

Reduction-in force and/or corporate reorganizations have a greater impact on older workers. Discharged older employees during such downsizing who have *bona fide* claims have a difficult time in court especially if the employee must point to a replacement. Our courts must see to it that employers are not allowed to use even a legitimate downsizing as a smoke screen for age discrimination.

II.

WHETHER A PLAINTIFF ALLEGING A DISCRIMINATORY DISCHARGE UNDER THE ADEA DURING A DOWNSIZING HAS BEEN "CONSTRUCTIVELY REPLACED" AS A MATTER OF LAW IF HIS DUTIES HAVE BEEN DISTRIBUTED TO YOUNGER LESS QUALIFIED EMPLOYEES AND, IF SO, WHETHER SUCH "CONSTRUCTIVE REPLACEMENT" WOULD SATISFY THE REPLACEMENT ELEMENT IN THE FOURTH PRONG OF THE McDONNELL-DOUGLAS *PRIMA FACIE* CASE.

The Third Circuit observed but did not give any weight to the fact that petitioner's duties at the time of the reduction-in-force were assumed by other younger workers who remained in the department. (App. 6a). In contrast, in *Montana v. First Federal S& L of Rochester*, 869 F.2d 100, 105-6 (2nd Cir. 1989), a case on point, the Second Circuit overturned summary judgment in a reduction-in-force case because in part the discharged employee's responsibilities were reassigned to younger employees and no options were given to the discharged employee.

The Fifth Circuit in *Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633 (5th Cir. 1985) reversed the granting of summary judgment in a reduction-in-force case. In *Thornbrough*, the Circuit Court stated that it is not the discharge itself alone that creates an inference of discrimination but rather the discharge coupled with the retention of younger employees.

The need for uniformity in the federal courts in determining what constitutes a *prima facie* case in reduction-in force cases is of utmost importance especially in these times when downsizing has become almost fashionable.

CONCLUSION

For the reasons set forth herein, petitioner Leo Dammer respectfully requests that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 11, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5281

LEO A. DAMMER

v.

MERCEDES - BENZ OF NORTH AMERICA, INC.

LEO DAMMER,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 92-02891)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, SAROKIN, and LAY,* *Circuit Judges*

The petition for rehearing filed by the appellant, Leo A. Dammer, in the above captioned matter having been submitted

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:
s/ Morton A. Greenberg
Circuit Judge

DATED: MAR 11 1996

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 1, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

95-5281

LEO A. DAMMER,

v.

MERCEDES - BENZ OF NORTH AMERICA, INC.

LEO DAMMER,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 92-02891)
District Judge: Honorable John W. Bissell

Submitted under Third Circuit LAR 34.1(a)
February 1, 1996

BEFORE: GREENBERG, NYGAARD, and LAY*, *Circuit Judges*
(Filed: FEB 01 1996)

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix B

MEMORANDUM OPINION OF THE COURT

LAY, *Circuit Judge.*

Leo Dammer brought this action alleging, inter alia, age discrimination in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*, and New Jersey's Law Against Discrimination, N.J. Rev. Stat. § 10:5-1 *et seq* (1992). Dammer now appeals from the district court's order of summary judgment entered in favor of his former employer, Mercedes Benz of North America, Inc. (MBNA).

Background

Dammer was employed by MBNA from April 3, 1972 through September 4, 1991. He was a Parts Import Supervisor. He was 56 years of age when he was discharged. On the date of his termination, MBNA instituted a company-wide reduction-in-force, because of a 42% drop in sales in the preceding five years. Based upon anticipated business needs, many jobs were eliminated or consolidated during the reduction-in-force. Two positions within Dammer's department were eliminated, that of Parts Import Supervisor and one of the import clerk positions.[1] The duties of each position were absorbed by other employees within the department. Company wide, the reduction-in-force resulted in the lay-offs of seventy-four employees, thirty-three of whom were over the age of forty, and forty-one of whom were under the age of forty.

Over one year before the reduction-in-force, which

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1. Two positions which were vacant during the reorganization of the Import Department were also eliminated during the reduction-in force. Def.'s Br. at 24.

occurred in September 1991, MBNA offered a voluntary early retirement package to employees 55 years of age or older who had worked for MBNA for at least 10 years. Employees who were offered the package, including Dammer, had until October 31, 1990 to decide whether they would take early retirement. Dammer declined, and alleges that during this period, he was approached by his supervisor who wanted to know if Dammer had made his decision. From this, Dammer alleges that MBNA wanted to force him out because of his age, although he stated no one attempted to influence his decision or made him believe he would be forced out in the event he declined the package. He heard nothing from his supervisors that led him to believe they were trying to get rid of him, except an isolated comment made by Mr. Ruppert, a supervisor, who once said to Dammer, "age before beauty."

Dammer contends that he was then ignored by his supervisors and his duties were taken over by a younger employee. Dammer asserts that immediately prior to the reduction-in-force, MBNA hired three new employees to replace workers who had opted for early retirement. MBNA asserts that none of these employees were hired to replace Dammer, that they were not similarly situated to Dammer, and that all of Dammer's duties were not assumed.

Dammer filed this action in the United States District Court for the District of New Jersey, alleging age discrimination, violation of public policy by retaliating against him after he decided not to accept MBNA's early retirement offer, and breach of duty of good faith by MBNA for failing to follow alleged procedures in its employee handbook giving him preferential treatment for available positions within MBNA. On April 6, 1995, the district court granted MBNA's motion for summary

judgment on Dammer's claims, finding no genuine issue of material fact existed, and that MBNA was entitled to judgment as a matter of law. Dammer timely appeals.

Age Discrimination

The framework of evidentiary burdens in ADEA actions is now well settled. Dammer must first establish a prima facie case of discrimination. In the absence of direct evidence, a plaintiff may establish a prima facie case by demonstrating by a preponderance of the evidence that he or she (1) belongs to a protected class, i.e., is at least 40 years of age; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination. *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 846 (3d Cir. 1992). A prima facie case creates an inference of unlawful discrimination, and places upon the defendant the burden of producing a legitimate, non-discriminatory reason for the adverse employment decision. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

The district court held Dammer did not establish a prima facie case of age discrimination. We agree. Dammer has not demonstrated any new employee was hired to replace him. A younger man assumed some of Dammer's former duties, but he did not take over the job of Parts Import Supervisor. Additionally, other employees in the department assumed some of Dammer's former responsibilities as the Parts Import Supervisor position was eliminated and consolidated. Indeed, Dammer himself conceded that his job duties were absorbed by the remaining staff. Def.'s App. at 21.

Appendix B

MBNA produced evidence showing over half of the employees discharged during the reduction-in-force were under the age of 40. Moreover, in Dammer's department, he was the only employee within the protected class whose position was eliminated due to the reduction-in-force. The other position which was eliminated, an import clerk's position, was held by an employee under the age of forty. Another import clerk who was fifty-three, within the protected class, was retained. Thus, Dammer has not shown others who were not in the protected class were treated more favorably. The district court properly held that, as a matter of law, Dammer could not establish a prima facie case of age discrimination.

Pretext

Assuming Dammer had established a prima facie case of age discrimination, the burden would then shift to MBNA to show a legitimate, non-discriminatory reason for Dammer's termination. MBNA does not need to prove that it relied upon the non-discriminatory reason to rebut the prima facie presumption, but only needs to show that such a reason existed. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2748 (1993). Once MBNA demonstrates a legitimate business purpose, Dammer bears the burden of proving MBNA's proffered reason for termination was merely a pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Pretext may be proven through direct or circumstantial evidence attacking the credibility of MBNA's reason. *Billet*, 940 F.2d at 816. In this case, MBNA points to the reduction-in-force and elimination of Dammer's position in the MBNA structure. This demonstrates a sufficient non-discriminatory reason. *Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994). While Dammer points to circumstances which he believes evidence an

intent on the part of MBNA to discriminate against him, we hold he has not sustained his burden to defeat the motion for summary judgment. The single comment of "age before beauty" does not demonstrate direct evidence of a discriminatory motive. *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992); *see also Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir. 1991) (statements by former supervisor that plaintiff would "need to surround himself with people his age" nothing more than stray remarks), *cert. denied*, 503 U.S. 908 (1992). Mr. Ruppert, who like Dammer was from Germany, is approximately the same age as Dammer. Nothing in the record indicates anything but two middle-aged men bantering over seniority. *Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1551 (D.N.J. 1990). Moreover, there is evidence in the record that the comment was an English translation of a German expression of respect.[2] Since Dammer cannot show MBNA's decision to eliminate his position during the reduction-in-force was merely a pretext for unlawful age discrimination, the district court correctly granted summary judgment in favor of MBNA.

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2. In deposition, Dammer testified:

> [H]e made numerous remarks that I was much more experienced and he always held the door open when we went together, he said age before beauty, you know, even though he had — by ranks [sic] he had more stripes than I had and it was generally known there was nobody — there is nobody older right now except — when I said nobody, except even Angelino is older, but he is a quiet guy.

Def.'s App. at 30.

Appendix B

Violation of Public Policy

Dammer next contends that MBNA violated public policy by retaliating against him after he decided not to accept its offer of early retirement. Specifically, Dammer claims that after his decision, MBNA ignored him and subjected him to demeaning and stressful treatment, allegedly in violation of public policy.

A limited cause of action exists for wrongful discharge where an employee is terminated for conduct which is protected by public policy. *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980). A plaintiff must identify such public policy, however, for this action to arise. There exists a strong public policy against age discrimination. As we have said, however, there is nothing in the record, other than Dammer's bald assertions, to demonstrate or create an inference that he was a victim of discrimination or retaliation. Dammer was terminated as part of a reduction in force. There is no strong public policy which encourages job security in the face of such restructuring. *See Brunner v. Abex Corp.*, 661 F. Supp. 1351 (D.N.J. 1986). Furthermore, a *Pierce* claim is limited to cases where a statute does not address the same right alleged to reflect public policy. *See Blum v. Witco Chem. Corp.*, 829 F.2d 367, 376-77 (3d Cir. 1987). Both the ADEA and NJLAD address that very same right. A *Pierce* claim will not also lie for alleged age discrimination. We affirm the district court's grant of summary judgment on Dammer's public policy claim.

Breach of Duty of Good Faith

Finally, Dammer claims MBNA breached its duty of good faith by failing to follow procedures in its employee handbook granting him "preferential treatment" regarding available jobs.

Appendix B

The employee handbook sets forth posting procedures for available jobs. There is an exception, however, to the posting procedure, for employees whose positions may have been eliminated due to reorganization. The handbook states "[t]he posting process can be suspended to allow these employees to interview for available openings provided they meet the minimum position qualifications." Def.'s App. at 100.

At the time of the reduction-in-force, however, there were no available positions. *Dammer v. Mercedes-Benz*, No. 92-2891, at 13 (D.N.J. April 6, 1995). Prior to Dammer's termination, there were two open clerk positions, but they, along with Dammer's position and that of another clerk, were eliminated from the Import Department altogether. Moreover, the handbook contains a disclaimer the district court found to be effective as a matter of law. *See Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 560 (N.J. 1994) (conspicuousness of a disclaimer suitable for judgment as a matter of law). Thus, summary judgment on Dammer's handbook claim was proper.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/ Donald P. Lay
Circuit Judge

DATED:

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED FEBRUARY 1, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

95-5281

LEO A. DAMMER,

v.

MERCEDES - BENZ OF NORTH AMERICA, INC.

LEO DAMMER,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 92-02891)

BEFORE: GREENBERG, NYGAARD, and LAY,* *Circuit Judges*

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit LAR 34.1(a) on February 1, 1996.

On consideration whereof, it is now here ADJUDGED and ORDERED by this court that the order of April 6, 1995, be and is hereby affirmed.

---

* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix C

Costs taxed against appellant.

ATTEST:
s/ P. Douglas Sisk
Clerk

DATED: FEB 01 1996

APPENDIX D — ORDER IMPLEMENTING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT ENTERED APRIL 15, 1996

HANNOCH WEISMAN
A Professional Corporation
4 Becker Farm Road
Roseland, New Jersey 07068
(201)535-5300 6848
ATTORNEYS FOR DEFENDANT/APPELLEE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. CIV 92-2891 (JWB)

LEO A. DAMMER,

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant.

ORDER IMPLEMENTING MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

For the reasons set forth in the opinion of the United States Court of Appeals for the Third Circuit, and as set forth in the Judgment of that Court dated February 1, 1996,

Appendix D

IT IS on this 12th day of April, 1996

ORDERED that the this Court's Order of April 6, 1996 [sic] be and is hereby affirmed and that defendant's motion for summary judgment be and is hereby granted, and plaintiff's complaint is dismissed in it's entirety; and it is further

ORDERED that the costs of appeal be taxed against plaintiff, Leo A. Dammer;

s/ John W. Bissell
United States District Judge

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 6, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT NEW JERSEY

Civil Action No. 92-2891

LEO A. DAMMER

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant.

OPINION

APPEARANCES:

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(Attorney for Plaintiff)

HANNOCH WEISMAN
By: Carmine A. Iannaccone, Esquire
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(Attorneys for Defendant)

Appendix E

BISSELL, District Judge

This matter comes before the Court on defendant Mercedes-Benz of North America, Inc.'s ("Mercedes") motion for summary judgment. On or about December 26, 1991, plaintiff Leo A. Dammer filed a charge of age discrimination against defendant with the Division on Civil Rights of New Jersey ("CRD") and the Equal Employment Opportunity Commission ("EEOC"). The EEOC issued plaintiff a right to sue letter on May 8, 1992. (Freeman Cert., Exh. A). On July 20, 1992, plaintiff filed the underlying action. This Court has jurisdiction under 28 U.S.C. § 1331.

FACTS AND BACKGROUND

Plaintiff Leo A. Dammer was employed by defendant Mercedes-Benz from April 3, 1972 through September 4, 1991. (Dammer Dep. at 51). His position was that of Parts Import Supervisor. He was 56 years of age when he was terminated.

On the date of plaintiff's termination, defendant instituted a company-wide reduction-in-force ("RIF"). The RIF was implemented because of the change in economic conditions at Mercedes. (*Id.*) Between 1986 and 1991, Mercedes' sales dropped approximately 42%. (Gilson Cert., ¶ 6). Many jobs were eliminated or consolidated. (Dripchak Cert., Exh. A, ¶¶ 3, 5).

Two positions within plaintiff's department were eliminated, that of Parts Import Supervisor and one import clerk position. (Ruppert Cert., ¶ 6). The duties of each position were absorbed by other employees within the department. (*Id.*, ¶ 7). Defendant maintains that these positions were eliminated and that both employees who were terminated were not replaced.

(*Id.*, ¶8). It disputes plaintiff's allegation that he was replaced by a younger employee. The RIF resulted in the lay-offs of 74 employees, 33 who were over the age of 40 and 41 who were under the age of 40. (Freeman Cert., Right to Sue Letter attached as Exh. A).

Prior to the RIF, defendant offered an early retirement package to employees 55 years of age and older and who had worked for Mercedes for at least 10 years. (Defendant's Br. at 4). These employees had three months to consider the package. (*Id.*) Plaintiff was one of the employees offered early retirement. (Plaintiff's Br. at 4). None of the employees had knowledge of a possible RIF during the period of consideration. (*Id.*)

Plaintiff claims that during this period, he was approached by his supervisor who wanted to know if he had made his decision. (Dammer Dep. at 76-77). He alleges that from this arises an inference that defendant wanted to force him out because of his age. (*Id.* at 71, 74). However, he has also stated that no one attempted to influence his decision or made him believe that he would be forced out in the event that he chose to decline the package. (*Id.*, at 117, 150-52). He adds that he heard nothing from his supervisors that led him to believe they were trying to get rid of him. (*Id.*) Defendant maintains that, at the time the package was offered to eligible employees, the company had not decided which positions would be affected by the RIF and in fact did not decide to eliminate plaintiff's position until one week prior to the implementation of the RIF. (Freeman Cert., Exh. C at 39-40; Exh. D at 38, 42)

Plaintiff claims that after he declined the package, he got a "strange feeling" and was ignored by his supervisors. (Dammer Dep. at 124, 140). He asserts that at this time, his duties were

taken over by Mr. Ahlden, a 28-year-old employee from Germany. (*Id.* at 138, 140). Mr. Ahlden allegedly "came into plaintiff's department and in essence took over." (Plaintiff's Br. at 6). Plaintiff claims that the decision for Mr. Ahlden to "take over" was made while plaintiff was considering the early retirement package which evidences an intent of defendant to replace him because of his age. (Velantzas-Austin Cert., Exh. G).

In furtherance of his claim, plaintiff asserts that immediately prior to the RIF, defendant hired three new employees. (Dammer Dep. at 168-72). However, one of the new hires was within the protected class, the two others were hired to replace workers who had opted for early retirement and none were hired to replace plaintiff. (*Id.*) In addition, defendant asserts that Mr. Ahlden was not hired to replace plaintiff, that he was not similarly situated to plaintiff as he is a temporary employee who is an expatriate from Germany and that he did not assume all of plaintiff's duties. (Ahlden Dep. at 22-23). Furthermore, defendant claims that Mr. Ahlden replaced Mr. Lenz, plaintiff's supervisor, who was terminated for poor performance. (*Id.*)

The only direct statement that plaintiff claims demonstrates an intent to discriminate against him because of his age was from Mr. Ruppert, a supervisor, who once said to plaintiff, "age before beauty." (Dammer Dep. at 190-92). Mr. Ruppert was born and raised in Germany. Plaintiff adds that he was impliedly entitled to preferential treatment in obtaining another position once his position was eliminated from the terms laid out in the Employee Handbook. It provides:

> This handbook is not a contract of employment. The Company reserves the

> right to change, modify, augment or delete benefits, entitlements, wages and working conditions at any time; and no promises for future consideration are made or implied by the descriptions contained in this handbook. . . . In addition, preferential treatment is afforded employees whose positions may have been eliminated due to reorganization. The posting process can be suspended to allow these employees to interview for available openings provided they meet the minimum position qualifications.

(Velantzas-Austin Cert., Exh. K).

ANALYSIS

I. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" Fed. R. Civ. P. 56(c); *see also Chipollini v. Spencer Gifts Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed,* 483 U.S. 1052 (1987). In deciding a motion for summary judgment, a court must view facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *Continental Insurance Co. v. Bodie,* 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the

burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment,

> the judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*)

In order to survive a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence" in his favor. He "cannot simply reallege factually unsupported allegations contained in his pleadings." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 325 (1986); *see also Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990). Only

evidence that would be admissible at trial may be used to test a summary judgment motion. Evidence whose foundation is deficient must be excluded from consideration. *Williams v. Borough of West Chester, PA*, 891 F.2d 458, 466 (3d Cir. 1989); *see also Trap Rock Indus., Inc. v. Local 825 Int'l Union of Operating Eng'rs*, 982 F.2d 884, 890-91 (3d Cir. 1992).

II. Plaintiff Cannot Point to Any Genuine Issue of Fact that Would Demonstrate that Defendant Discriminated Against him on Account of His Age.

A. Age Discrimination

In order to establish a case of discrimination under the ADEA or the NJLAD, the plaintiff must prove that his age was a determinative factor in Mercedes' decision affecting his employment. *Seman v. Coplay Cement Co.*, 26 F.3d 428 (3d Cir. 1994); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 (3d Cir. 1990); *Anderson v. Exxon Co.*, 89 N.J. 483, 492 (1982). Initially, a plaintiff must prove four *prima facie* elements to maintain an action under NJLAD. *Roebuck v. Drexel University*, 852 F.2d 715, 726 (3d Cir. 1988); *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 846 (3d Cir. 1992); They are:

1. The plaintiff is a member of a protected class.

2. The plaintiff was qualified for the position.

3. The plaintiff was dismissed despite his qualifications.

> 4. He was replaced by an individual not in the protected class, [over 40].

Miller, 977 F.2d at 847.

Under the *McDonnell-Douglas* scheme for discrimination actions, establishment of a *prima facie* case creates a presumption that the employer unlawfully discriminated against the employee. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). "Presumption" in a discrimination action means that once a plaintiff proves the necessary *prima facie* elements, a conclusion in his favor is required absent an adequate explanation by the defendant. *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742, 2746 (1993). This presumption places upon the defendant the burden of producing a legitimate, non-discriminatory reason for the adverse employment decision. (*Id.* at 2747).

The defendant does not need to prove that it relied upon the non-discriminatory reason to rebut the presumption, only that one existed. (*Id.* at 2748). Once the defendant demonstrates a legitimate business purpose, plaintiff bears the burden of proving the defense's proffered reason for termination was merely a pretext for discrimination. *Burdine*, 450 U.S. at 257. A pretext may be proven through direct or circumstantial evidence attacking the credibility of defendant's reason. *Gray v. York Newspapers Inc.*, 957 F.2d 1070, 1078 (3d Cir. 1992)

B. The Instant Case

Plaintiff has clearly established the first three elements of his *prima facie* case. He is a member of the protected class, qualified for the position he held and was terminated.

(Velantzas-Austin Cert., Exh. L). What is not clear is whether he was replaced with someone not in the protected class.

As Mr. Ahlden was 28 at the time he came to the New Jersey plant from Mercedes in Germany, he is not a member of the protected class. However, plaintiff has not sufficiently demonstrated that Mr. Ahlden was hired to replace him. While Mr. Ahlden appears to have assume some of plaintiff's former responsibilities, he did not take over the job of Parts Import Supervisor. (Ahlden Dep. at 22-23; Ruppert Dep. at 24-29, 45). In addition, other employees in the department assumed some of plaintiff's former responsibilities as his position was eliminated and consolidated. (Ruppert Cert. ¶ 7). Furthermore, approximately half of the employees fired as a result of the RIF were not within the protected class. (Gilson Cert., ¶ 9). This Court does not believe that plaintiff has established a *prima facie* case.

Furthermore, when a *prima facie* case has been demonstrated, the burden shifts to defendant to show a legitimate, nondiscriminatory reason for the termination of plaintiff. Defendant points to the RIF including the abolition of plaintiff's position in the Mercedes-Benz of North America structure. This demonstrates a sufficient non-discriminatory reason. *Palochko v. Manville Corp.*, 21 F.3d 981, 982 (10th Cir. 1994). While plaintiff points to circumstances which he believes evidence an intent on the part of defendant to discriminate against him, this Court determines that he has not sustained his burden sufficiently to defeat the present summary judgment motion. He points to nothing in the record that demonstrates an intent to discriminate. The single and "stray" remark of "age before beauty" does not demonstrate a discriminatory motive. *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (single statement by a supervisor that he "needed younger blood" did not rebut the employer's non-discriminatory reason

of poor work performance as to the precipitation of the discharge and summary judgment was granted). Mr. Ruppert, who made the comment, is approximately the same age as plaintiff; therefore, "nothing in the record suggests anything but two middle-aged men bantering over seniority." *Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1551 (D.N.J. 1990). There is also evidence in the record that the comment was a translation of a German expression of respect. (Dammer Dep. at 192). Therefore, summary judgment in favor of the defendant is granted.

III. Mercedes has not Violated any Clear Mandate of Public Policy in its Termination of Plaintiff.

The parties do not dispute that the public policy exception cannot be construed to require job security in the context of a reduction in force, nor is there any contention that an employer has no duty to reassign senior employees. Plaintiff claims that defendant violated public policy by retaliating against him after he decided not to accept defendant's offer of early retirement. Specifically, plaintiff claims that after his decision, defendant ignored him and subjected him to demeaning and stressful treatment which treatment is allegedly violative of some strong public policy.

A limited cause of action exists for wrongful discharge where an employee is terminated for conduct which is protected by public policy. *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58 (1980). For this action to arise, the plaintiff must identify such public policy. (*Id.*) Sources of public policy include legislation, administrative rules, regulations and judicial decisions. (*Id.* at 72). If an at-will employee, like plaintiff, cannot point to any specific public policy which protects the conduct for which he was fired, he may be fired with or without cause.

Appendix E

Unquestionably there exists a strong public policy against age discrimination. However, there is nothing in the record, other than the bald assertions made by plaintiff, to demonstrate or create an inference that he was the victim of discrimination or retaliation. This Court determines that he was terminated as part of a reduction in force. It is clear that there is no strong mandate of public policy which encourages job security in the face of such a restructuring. *Brunner v. Abvex Corp.*, 661 F. Supp. 1351 (D.N.J. 1986). Further, a *Pierce* claim is limited to cases where a statute does not address the same right alleged to reflect public policy. Here the ADEA and NJLAD address that very right; therefore, a *Pierce* claim will not also lie for alleged age discrimination. As such, summary judgment on behalf of defendant is appropriate.

IV. Plaintiff Cannot Prevail on a Theory of Implied Contract or a Claim that Defendant Breached a Duty of Good Faith by Failing to Follow Alleged Procedures in the Employee Handbook.

Plaintiff was an at-will employee. Such status is protected if certain representations in an Employee Manual or Handbook establish an implied promise not to terminate without just cause. *Woolley v. Hoffman-La Roche. Inc.*, 99 N.J. 284, *modified*, 101 N.J. 10 (1985). However, if the manual contains an explicit disclaimer that specifically states that the employer remains free to terminate an employee without cause, the manual is not a binding contract of employment and the employee may be so terminated. (*Id.* at 309); *Preston v. Claridge Hotel & Casino, Ltd.*, 231 N.J. Super. 81 (1989). The *Woolley* Court held:

> The provisions of the manual concerning job security shall be considered binding unless

> the manual elsewhere prominently and unmistakably indicates that those provisions shall not be binding or unless there is some other similar proof of the employer's intent not to be bound. . . . All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Woolley, 99 N.J. at 307, 309.

Even assuming that the provision, "preferential treatment is afforded employees whose positions may have been . . . eliminated due to reorganization" is reasonably interpreted to mean that the employee is promised maximum job security, this Court believes that defendant has included in the Employee Manual a sufficient disclaimer. (Velantzas-Austin Cert., Exh. K). On the first page, defendant lays out:

> This handbook is not a contract of employment. The Company reserves the right to change, modify, augment or delete benefits, entitlements, wages and working conditions at any time; and no promises for

future consideration are made or implied by the descriptions contained in this handbook.

(*Id.*) In the face of this disclaimer, a reasonable employee would believe that he remained an at-will employee who was not necessarily entitled to preferential treatment in the event of a reduction in force.

In addition, the statement that refers to preferential treatment is found in the section of the employee Manual which pertains to posting procedures for open positions. (Freeman Supp. Cert., Exh. A). At the time that plaintiff was terminated, there were no open positions. (Ruppert Dep. at 40). Prior to plaintiff's termination, there were two open clerk positions but they, along with another clerk and plaintiff, were eliminated from the Import Department altogether. (*Id.*) Therefore, summary judgment in favor of defendant Mercedes is appropriate.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is granted as to all claims, and this action is dismissed.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: April 6, 1995

Appendix E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 92-2891

LEO A. DAMMER,

Plaintiff,

v.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Defendant.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 6th day of April, 1995,

ORDERED that defendant's motion for summary judgment be and it hereby is granted, and plaintiff's complaint is dismissed in its entirety.

s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

APPENDIX F — EEOC DETERMINATION LETTER DATED MAY 8, 1992

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEWARK AREA OFFICE
60 PARK PLACE
NEWARK NJ 07102

Charge Number: 171920158

Leo A. Dammer
One Colonial Terrace
Upper Saddle River, New Jersey 07458

Charging Party

Mercedes Benz of N.A., Inc.
1 Mercedes Drive
Montvale, New Jersey 07645

Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the above cited charge.

All requirements for coverage have been met. Charging Party alleged that he was discriminated against in violation of the ADEA in that he was discharge from his position as Import Supervisor on September 4, 1991 because of his age (56).

Examination of the evidence indicates that due to economic and business necessity, Respondent conducted a company-wide

reduction in force. Job functions were analyzed to determine which positions could be eliminated without negatively impacting the operations of the department. Jobs were eliminated on the basis of anticipated needs. Evidence reveals that two (2) positions were eliminated in the Import Department. The positions were a Clerk position and Charging Party's position as Import Supervisor. The Clerk affected is under the protected age group. The functions of the Import Supervisor position were transferred to remaining department positions. Nine (9) employees in the department were not affected. Five (5) are within the protected age group. Seventy-four (74) employees were affected company-wide by the reduction in force. Thirty-three (33) are within the protected age group.

Respondent's present workforce is composed of 583 employees of which 300 are within the protected age group.

Based on this analysis, I have determined that the evidence obtained during the investigation does not establish a violation of the ADEA.

If the charge was filed within 180 days of the alleged discrimination (300 days in states with a state age discrimination law), Charging Party may sue under the ADEA for recovery of backpay, an equal amount as liquidated damages, appropriate make-whole or injunctive relief, and attorneys' fees and court costs.

A lawsuit under the Age Discrimination in Employment Act ordinarily must be filed within 2 years of the date of discrimination alleged in the charge. On November 21, 1991, the ADEA was amended to eliminate this 2 year limit. An ADEA lawsuit may now be filed any time from 60 days after a charge if

filed until 90 days after receipt of notice that EEOC has completed action on the charge. Because it is not clear whether this amendment applies to instances of alleged discrimination **occurring before November 21, 1991**, if Charging Party decides to sue, a lawsuit should be brought **within 2 years of the date of alleged discrimination and within 90 days of receipt of this letter, *whichever is earlier***, in order to assure the right to sue.

s/ Corrado Gigante
Corrado Gigante
Area Director

May 8, 1992
Date

cc:

5-8-92
Date of Mailing